No. 9038.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

A. J. GUTZLER, F. M. McDONNELL, L. T. BARNESON, J. LESLIE BARNESON and FRANK L. A. GRAHAM, Trustees for TRUMBLE REFINING COMPANY, a dissolved corporation,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Opinion Below.

The District Court's memorandum opinion was filed March 1, 1937 [R. 331-339]. It is not reported.

Jurisdiction.

This case involves income and excess profits taxes for the calendar year 1917. The District Court's judgment in favor of the taxpayer for the full amount claimed, $33,575.01, was entered on May 31, 1938 [R. 59-60]. The petition for appeal and assignment of errors [R. 396-

403] were filed on August 30, 1938, and an order allowing the appeal was filed on August 30, 1938 [R. 404]. This Court's jurisdiction is invoked under Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. 225.

Questions Presented.

1. Whether a timely suit was instituted after the rejection of a timely claim for refund?
2. Did the Commissioner of Internal Revenue make a final assessment of the taxpayer's excess profits taxes for the calendar year 1917 under Section 210 of the Revenue Act of 1917?
3. Can the Commissioner of Internal Revenue deprive a taxpayer of his right to a judicial review of an assessment of excess profits taxes by imposing an unrequested and arbitrary special assessment under Section 210 of the Revenue Act of 1917?

Statutes Involved.

[See Appendix, pages 45-46.]

Summary of Argument.

I.

The District Court found that the Commissioner never finally rejected the appellee's claim for refund of 1917 income and excess profits taxes until July 25, 1930, and that from June 7, 1920, the date when said claim was filed, until July 25, 1930, both the Commissioner and the appellee carried on negotiations for the settlement of the latter's 1917 tax liability. This action was commenced on July 21, 1932, within two years of the date when the Commissioner finally rejected the claim for refund. The appellant has failed to show that the foregoing findings have no evidence to support them.

The evidence shows that the contested issue involved in the appellee's tax liability for the year 1917 was its right to an annual deduction for depreciation of its patent license agreements. This same issue, necessarily a recurring one, was involved in the determination of the appellee's tax liability for each of the years 1917 to 1920, inclusive. On December 9, 1922, the head of the Bureau's Special Audit Section assured the appellee that its 1917 case would be held in abeyance pending further examination by the Commissioner of the appellee's tax liability for the years 1918 to 1920. Accordingly, the appellee filed with the Department a waiver of the statute of limitations governing the time within which the Commissioner could make an additional assessment for the year 1917. Thereafter, the Commissioner himself confirmed the agreement made by the

appellee and the head of the Special Audit Section and he invited the appellee to a further hearing on its 1917 case.

In acceptance of that offer the appellee filed a brief with the Bureau during May of 1924, in which it argued the points involved in its tax liability for the years 1917 to 1920, inclusive. Subsequently a hearing was had at which the Commissioner's representative had before him the files for those years and the parties argued the depreciation issue which was common to all taxable periods. Thereafter, the Committee on Appeals and Review determined that the appellee was entitled to an annual deduction for depreciation of its patent license agreements and that the March 1, 1913 value thereof was $160,000.00.

The depreciation issue involved in the appellee's 1917 case was likewise involved in its tax liability for the years 1918 and 1920 to 1923, inclusive. With respect to the latter years, the United States Board of Tax Appeals decided on October 30, 1929, that the appellee was entitled to an annual deduction for depreciation and that the fair market value of its patent license agreements on March 1, 1913, was $850,000.00. Thereupon the appellee amended its original claim for refund on April 25, 1929, to include in its prayer for relief an additional amount, namely, $6,365.00 paid on May 22, 1923, in satisfaction of an assessment under Section 210 of the Revenue Act of 1917 proposed by the Commissioner but never finally determined by him. The grounds relied upon by the appellee in its amended claim were the same as those upon which it predicated its right to a refund in its original claim, the only difference between the two being that the latter demanded the refund of a greater amount. Since the amended claim was filed prior to a final rejection by the Commissioner and merely asked for greater relief upon the same grounds

relied upon by it in its original claim, the amended claim was a permissible and timely one.

By a letter dated May 22, 1930, the Commissioner advised the appellee that its claim for refund for 1917 taxes would be rejected, not because the claim was untimely, but because the Commissioner did not acquiesce in the Board's decision for other years. On July 25, 1930, the Commissioner formally rejected the appellee's claim for refund of 1917 income and excess profits taxes. That the Commissioner did not make a final determination of the 1917 case until July 25, 1930, is further evidenced by the fact that it was not until November 3, 1930 that the Commissioner ever indicated that in his opinion the claim for that year was barred by the statute of limitations, although he had prior thereto interposed that defense with respect to other taxable periods.

II.

The argument made by the appellant that the Commissioner's assessment under Section 210 of the Revenue Act of 1917 is not subject to judicial review is entirely inapplicable to this case because here the Commissioner never made a final determination of the appellee's net income, a factor which the Supreme Court has held must be ascertained before a special assessment under that section of the Act can be made. The evidence shows that from the date when the taxpayer filed its claim for refund until July 25, 1930, the Commissioner continued negotiations with the appellee. Throughout that period the principal issue discussed was the appellee's right to a deduction for depreciation of its patent license agreements, a factor which of necessity had to be determined before the appellee's net income could be computed. Since the Commissioner never

finally determined that factor his proposed assessment under Section 210 was premature and invalid.

Section 210 of the Revenue Act of 1917 was enacted as a relief measure for the benefit of taxpayers whose excess profits taxes would be disproportionate under any other type of assessment. The election to invoke that assessment entailed a waiver of the right to a judicial review of the assessment made. Obviously the statute contemplated that the taxpayer should be the one to exercise the election for it was enacted as a special relief measure for his benefit. It is therefore apparent that the Commissioner cannot use that relief section as an offensive weapon to increase the tax over that due without the benefit thereof and by the same act deprive the taxpayer of his right to a judicial review. Thus, even assuming that the Commissioner made a final assessment under Section 210 of the Act (which is denied) still the taxpayer is entitled to recover in this action because it did not request a special assessment. Furthermore, in granting relief to this taxpayer the court has not been called upon to review any discretionary determination made by the Commissioner.

Finally, the evidence clearly shows that the Commissioner's proposed assessment under Section 210 of the Act was arbitrary and capricious for by an application of that section he determined that the appellee's tax liability for the year 1917 actually exceeded its net income by $2,773.23. Nothing but an arbitrary determination could conclude that the liability for taxes measured by net income could exceed the net income, for obviously such a tax amounts to confiscation. It is well established that where an administrative officer abuses his discretion or makes an arbitrary finding, his action in that regard is always subject to a judicial review.

ARGUMENT.

I.

The Action Brought to Recover 1917 Income and Excess Profits Tax Overpaid by Trumble Refining Company in the sum of $16,341.68 Was Timely.

Congress has established a statutory procedure whereby a taxpayer can recover taxes unduly exacted or erroneously paid. That procedure requires the taxpayer to file with the Commissioner of Internal Revenue a claim for refund thereof within four years next after the payment of the tax. Section 284 (b) (1), Revenue Act of 1926 (*infra,* p. 46). Section 3226 of the Revised Statutes (*infra,* p. 45) provides that a claim for refund shall constitute a condition precedent to an action for the recovery of taxes and that no suit for the recovery thereof can be brought later than five years after the date when the tax is paid, or "two years after the disallowance of the part of such claim to which such suit or proceeding relates." The contest in this case centers in part about the interpretation of the above quoted phrase found in the statute.

In the case at bar the appellee was entitled to a deduction in the year 1917 for the exhaustion of the March 1, 1913 value of its patent license agreements. Both the Board of Tax Appeals and the Committee on Appeals and Review have held that the taxpayer was entitled to an annual deduction for the exhaustion of said patents. The decision of the Board of Tax Appeals on that issue [R. 287] is *res adjudicata* and forecloses any denial thereof by the appellant in this case. *Erb et al. Exr's v. U. S.,* 384 C. C. H. 9589 (D. C., N. Y., not yet officially reported). But in any event the District Court in this case held that the taxpayer was entitled to the deduction claimed by it

for the year 1917. The appellant urges no defense on the merits but argues that the appellee's cause of action is barred by the statute of limitations. The rule applicable in such a situation was recently stated by the Third Circuit Court of Appeals in *Allegheny Heating Company v. Lewellyn,* 91 Fed. (2d) 280, 283:

> "It is undisputed that under the determination of the taxpayer's tax liability for the years in question made by the Commissioner on January 15, 1929, the taxpayer had overpaid its taxes and was entitled to the refunds here claimed except for the bar of the statute of limitations. *The equities are, therefore, all with the taxpayer. The rule that tax laws should be construed most strongly in favor of the taxpayer is peculiarly applicable here.* * * *" (Emphasis supplied.)

The Trumble Refining Company in its income tax return for the year 1917 filed in April, 1918, disclosed a net taxable income of $89,469.54 and a tax liability of $11,870.68. In computing the net taxable income no deduction was taken for the patent license agreements. On June 7, 1920, an amended income tax return was filed wherein a deduction for depreciation was taken and a net taxable income shown of $35,348.12. At the same time Trumble Refining Company filed a claim for refund of $9,749.80 [R. 46, 138], the claim setting forth that the Trumble Refining Company was entitled to depreciation on its patent license agreements. As a part of the claim for refund and amended return Trumble Refining Company at the same time filed a claim for abatement of additional taxes in the sum of $6,365.00 which had been assessed by the Commissioner on May 17, 1920, the grounds for the claim for abatement being exactly the same as those in support of

the claim for refund. The reasons given by the Commissioner for making the additional assessment was that he could not determine the invested capital of Trumble Refining Company. The Commissioner, by letter dated December 13, 1921, rejected the claim for refund [R. 46]. Notwithstanding these facts the Commissioner, through his local agent at Los Angeles, made an investigation of the tax liability of the Trumble Refining Company for the years 1917 to 1920, inclusive, and by a report dated in August, 1921, proposed large additional assessments for each of those years. The claim for refund was timely filed and the basis thereof was never changed. The trial court held that the claim for refund for the year 1917 was reopened and reconsidered, and negotiations continued in respect thereof until July 25, 1930.

The principle is now well established that if the Commissioner reopens a case on the merits after he has ruled on it, the statute of limitations does not begin to run until he announces whether he will reject or adhere to his former decision. *McKesson & Robbins, Inc., v. Edwards* (C. C. A. 2), 57 Fed. (2d) 147; *Mobile Drug Co. v. United States* (D. C.), 39 Fed. (2d) 940; *Pierce-Arrow Motor Car Co. v. United States* (Ct. Cl.), 9 Fed. Supp. 577. *American Safety Razor Corp. v. United States* (Ct. Cl.), 6 Fed. Supp. 293; *Jones v. United States* (Ct. Cl.), 5 Fed. Supp. 146. In *Jones v. United States* the court said at page 152:

> "That a reconsideration of a refund claim on the merits constitutes a reopening of the claim is no longer open to doubt. Mobile Drug Co. v. United States (D. C.), 39 F. (2d) 940, and McKesson & Robbins, Inc., v. Edwards (C. C. A.), 57 F. (2d) 147. These cases announce the rule that when the

> Commissioner, upon application made by a taxpayer within the time in which suit could be instituted on a disallowed claim, enters into a reconsideration of the merits of the claim and later makes a decision thereon rejecting the claim, or adheres to his former decision rejecting it, his decision for the purpose of the statute of limitations is in abeyance until he has reached and announced his final decision, and the taxpayer, under section 3226 of the Revised Statutes, as amended (26 U. S. C. A., §156), has two years thereafter in which to institute suit. * * *"

There is adequate evidence in the record to sustain the trial court's finding that the Commissioner did not act with finality upon the appellee's claim until July 25, 1930. On February 1, 1922, the appellee filed with the Commissioner a comprehensive brief of which plaintiff's exhibit No. 3 is a copy. An examination of that brief, which was prepared by the appellee's tax consultant, shows that it dealt with the subject matter of assessment of said taxes against the appellee for the years 1917 to 1920, both inclusive. Therein the appellee protested against the proposed additional taxes for each of the years in question. The principal contention discussed in the brief and the one which the appellee asserted was applicable to each of the years 1917 to 1920, inclusive, was the contention that it was entitled to an annual deduction of $54,121.42 from income by reason of the annual exhaustion of the March 1, 1913 value of its patent license agreements.

Thereafter on December 9, 1922, the appellee's tax consultant conferred with one of the officials of the Bureau of Internal Revenue who was in charge of the Special Audit Section. He asked for a hearing regarding the 1917 to 1920 taxes, but the official notified him that the

Bureau was not ready to take up the matter of appellee's taxes for all of those years but would hold in abeyance the question of the taxes for 1917 until the remaining years' taxes could also be reviewed [R. 48, 247, 285].

At the request of the Commissioner the Trumble Refining Company on or about February 21, 1920, filed an unlimited waiver of the statute of limitations governing the time within which the Commissioner could make an assessment of additional taxes for the year 1917 [R. 48, 147, 149]. In his request for a waiver the Commissioner advised the taxpayer that he was reluctant to determine the true tax liability "until after a thorough audit and considerable consideration of all the facts in the case had been made." This conclusively establishes the fact that the assessment of additional taxes and his rejection of the claim for refund are based upon a superficial determination of the tax liability.

Although the appellant does not flatly deny that the head of the Special Audit Section of the Bureau assured the appellee that the 1917 case would be held open yet he implies as much [Br. 22, 23]. If no such assurance was given, then why did the appellee execute a waiver extending the time within which the Commissioner could make an additional assessment for 1917? Does it seem probable that the appellee would voluntarily waive a defense for no reason whatsoever? The very fact that the appellee executed that waiver proves conclusively that some assurance was given to it that the 1917 case would be held open for further consideration.

The appellant argues that the assurance given to the appellee by the head of the Bureau's Special Audit Section that the 1917 case would be held in abeyance was not

authorized by the Commissioner. Appellant cites *Ritter v. United States,* 28 Fed. (2d) 265, a case wherein the taxpayer made an oral demand upon a *field agent* for the refund of overpaid taxes. The question in that case was to determine whether or not a field agent could waive the express requirements of Section 1113 of the Revenue Act of 1926, thus making it unnecessary for the taxpayer to file a written claim for refund prior to bringing suit. The court held that since a field agent has no authority to consider or act upon claims for refund his representations with respect thereto would not bind the government.

But the case at bar is not one involving a field agent. Here the agent was the head of the Special Audit Section [R. 48, 284]. He was the agent held out by the Commissioner as the one authorized to represent the Bureau in making a settlement on the claims for refund theretofore filed by this appellee. In *Ritter v. United States, supra,* the court said at page 267:

> "Is the government estopped from setting up the failure of the plaintiff to file a claim by the statement of its field agent that it was not necessary for him to do so? It is true, as plaintiff contends, that when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. Walker v. United States (C. C.), 139 F. 409; Cook v. United States, 91 U. S. 389, 23 L. Ed. 237; United States v. Flint, 25 Fed. Cas., p. 1107, No. 15,121. *The acts or omissions of the officers of the government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the government, if the officers have acted within the scope of their authority.* The field agent in the instant case was not authorized to waive

> the requirements of the statute or the regulations, nor to make rules and regulations in accordance with which overpayments should be refunded. His duty was to audit accounts. He therefore had no authority to tell the plaintiff that he need not observe the requirements of the statute and of the regulations. Therefore the government is not estopped by his unauthorized statements." (Italics supplied.)

Since the Commissioner confirmed the agreement of the Deputy Commissioner and did reopen and reconsider the tax liability for the year 1917, the argument of the appellant regarding the agent's authority is entirely without merit.

It is not disputed that the Commissioner had authority to reopen cases and to thus extend the statutory period within which a claim could be filed. *Jones v. United States,* 5 Fed. Supp. 146; *McKesson & Robbins, Inc., v. Edwards* (C. C. A. 2), 57 Fed. (2d) 147; *Mobile Drug Co. v. United States* (D. C.), 39 Fed. (2d) 940. It therefore follows that it was within the Commissioner's power to hold his agent out to the appellee as having that same authority, and in assigning him to settle the appellee's case he gave his agent authority to do whatever he himself would normally find to be necessary in settling the case. Thus it appears that the promise made by the Commissioner's agent to hold the 1917 case in abeyance until a hearing was had for all years was authorized and was binding upon the appellant.

That the claim was reopened and considered by the Commissioner really cannot be denied.

On February 5, 1923, the Commissioner notified the appellee that he had recomputed the appellee's taxes for

the year 1917 and that he had determined an overassessment in the amount of $151.17. The appellant argues that this was the final action taken by the Commissioner with respect to the appellee's 1917 taxes [Br. 23]. The District Court found to the contrary that the Commissioner reopened the case after having determined the overassessment [R. 54, 55]. The finding of fact so made by the District Court must necessarily stand unless there is no evidence in the record to sustain it. *Grissom v. Sternberger,* 10 Fed. (2d) 764; *Geo. A. Fuller Co. v. Brown,* 15 Fed. (2d) 672; *Cain v. Southern Alkali Corp.,* 95 Fed. (2d) 188.

The evidence, however, shows that after having received the Commissioner's letter of February 5, 1923, the appellee wrote to the Commissioner of Internal Revenue on February 23, 1923, calling his attention to the brief theretofore filed by it and calling attention to a conference had by its tax consultant with the Bureau's official on December 9, 1922, at which conference said official had notified the appellee that the Bureau would hold a hearing on all of the years 1917 to 1920 at one time. In this letter to the Commissioner the appellee requested that he withhold entering the overassessment for the year 1917 in view of these circumstances.

On May 15, 1923, the appellee telegraphed the Commissioner that in view of the understanding reached in the conference of December 9, 1922, and because the questions involved in 1917 affected all years the Commissioner should instruct the local Collector of Internal Revenue to withhold the collection of additional taxes assessed for 1917. In that same telegram the appellee requested that the Commissioner set a date for a conference to be held for the consideration of all taxable years involved [R.

153]. In response to that telegram the Commissioner wired the appellee on May 21, 1923, as follows:

> "Reply telegram fifteenth. No authority to instruct Collector Accept abatement claim to replace claim rejected Conference may be arranged on nineteen seventeen case if formal protest is filed but is impracticable on later years until information submitted is considered and audit completed" [R. 154].

Thereafter in May of 1924 the appellee's tax consultant, acting in its behalf, held a conference with an official of the Commissioner's office. At that conference he delivered to said official a brief, of which plaintiff's exhibit No. 4 is a copy. The appellant argues that the conference held in 1924 was limited to a consideration of the tax for the year 1918 [Br. 7]. However, the brief filed at that conference expressly states in the very heading thereof that it was submitted on an issue concerned in an additional assessment for the year 1917 and proposed additional assessments for 1918 and subsequent years [R. 253]. Nor is that the only indication in said brief that it was concerned with the 1917 case, for under the heading "Depreciation of Patent Rights" the brief states [R. 264-265]:

> "The Unit through its contention as set forth under No. 1, has held that the Trumble Refining Company is not entitled to any depreciation deductions claimed for patent rights or any part of such rights. This contention on the part of the Unit is clearly not in accord with the decision of the Committee as set forth in A. R. M. 35 previously referred to and quoted. It is accordingly respectfully requested that the decision of the Unit on this point be reversed."

It should not be forgotten that the main issue before the Committee on Appeals and Review was the right of Trumble Refining Company to a depreciation deduction based upon the March 1, 1913 value of its patent license agreements. This issue affected alike all years then under consideration.

Furthermore, Mr. Adams, the appellee's tax consultant, stated that when he filed that brief with the Commissioner he held a conference with respect to the years 1917 to 1920, inclusive, and particularly with reference to the issue of whether or not the appellee was entitled to depreciation on its license agreements. At that conference the Commissioner's representatives had the complete file before them, including the file for the year 1917 [R. 248]. The protest filed in 1923 specifically protesting the proposed assessment for 1917 was one of the documents in the hands of the Commissioner's representative at the conference and the 1917 case was involved in the discussion that took place [R. 249].

The appellant offered no evidence conflicting with the testimony given by Mr. Adams, the appellee's witness. In short, the appellant has offered no reason for disbelieving the appellee's witness. Certainly this court will not disturb the District Court's findings which are supported by uncontradicted testimony. In making its findings the District Court was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict. *United States v. Jefferson Electric Mfg. Co.,* 291 U. S. 386, 78 L. ed. 859; *Dooley v. Pease,* 180 U. S. 126, 45 L. ed. 457.

The appellant argues that only the 1918 case was formally referred to the Committee on Appeals and Re-

view and that therefore it had no authority to reopen the case for 1917. In support of that proposition it cites *Boyce v. United States,* 21 Fed. Supp. 274 (Ct. Cl.). That case held that the *Special Advisory Committee* was without authority to reopen, for prior years, a case involving the year 1923 referred to it by the Commissioner.

It appears from the findings of facts made in that case that the Special Advisory Committee returned the file therein to the Commissioner with a letter stating that when the claims for the prior years were considered by the Committee it was ascertained that the statute had already outlawed the claims. Thus it appears that the Special Advisory Committee refused to reopen the case on its merits. This was the principal ground relied upon by the court as shown by the following extract from its opinion at page 279:

> "* * * Although this Special Advisory Committee may have considered the refund claims for the purpose of arriving at a settlement of the case before the Board, and, in order to arrive at the amount justly due as deficiency for 1923, it may have been necessary to compute the depreciation for the previous years, nevertheless, the Special Advisory Committee did not recommend to the Commissioner that these claims for refund be reopened and reconsidered and the Commissioner took no action in reference to them after his first rejection in 1928. The record shows that, far from a recommendation to the Commissioner for a reopening and reconsideration, the Special Advisory Committee simply returned the papers to the files of the Bureau with a notation that they were barred by lapse of time. * * *"

The vital difference between that case and the case at bar is that in the *Boyce* case the court was considering the authority vested in the Special Advisory Committee whereas the question here concerns the authority of the Committee on Appeals and Review—an entirely different agency. In the *Boyce* case the court took care to emphasize the limited authority vested in the Special Advisory Committee and pointed out that it was vested with no general authority. At page 279 the court said:

> "The facts of this case are stipulated and show that the Special Advisory Committee was created for the purpose of assisting the Commissioner in disposing of the cases pending before the Board of Tax Appeals and the Commissioner could delegate to the Special Advisory Committee *special authority* in connection with *special cases.* Under its general powers, the matter of handling the deficiency which was then pending before the Board of Tax Appeals was included, and the stipulated facts show that the Commissioner referred this matter to the Special Advisory Committee. The facts do not show that the claims for refund which had been rejected by the Commissioner were referred by him to the Special Advisory Committee, and there is no *general* power delegated to the Special Advisory Committee which gives it the right to consider refund claims which have not been so specifically sent to it by the Commissioner. Doubtless, the Commissioner could have referred these claims to the Special Advisory Committee while it was considering the case before the Board, but the record does not show that he did so. * * * " (Italics supplied.)

In A. R. M. 219, C. B. III-1, p. 319 (appendix), the procedure for appealing to the Committee on Appeals and Review is outlined and the Committee's authority for hearing appeals is stated in part as follows:

> "While only the issues stated in the transmittal letter are before the Committee formally, the Committee is not precluded from calling to the attention of the Unit and of the Commissioner any errors which in its opinion may have been committed by the Unit in adjustments not made the subject of appeal."

It cannot be denied that the main issue considered by the Committee on Appeals and Review, which affected alike all the years including the year 1917, was the taxpayer's right to a deduction for depreciation of its patent license agreements. Certainly, the Committee on Appeals and Review had the right to determine that issue; in fact until that issue was settled the Commissioner of Internal Revenue could not legally make a determination of the true tax liability—that he advised the taxpayer he would make only after a thorough consideration of all the facts as an inducement to obtaining a waiver. Whatever determination the Committee on Appeals and Review made with respect to this question was, of course, controlling upon all the lesser units of the Bureau of Internal Revenue.

This is not a case where the Committee merely made computations of the tax for prior years in order to determine the correct tax for the year formally referred to it as in the *Boyce* case. Here the Committee heard the prior years' case on the merits at the same time that it heard the case for the year 1918. This was after the Commissioner had invited the appellee to be heard further on the 1917 case. Following the hearing the Com-

missioner advised the appellee by letter dated May 22, 1930, that its claim for refund for 1917 would be rejected, not because the claim was untimely but because the Commissioner did not acquiesce in the Board's decision for other years [R. 101]. This shows that he considered the claim on its merits and distinguishes this case from *B. Altman & Co. v. United States,* 40 Fed. (2d) 781 (Ct. Cl.), as well as the *Boyce* case, both of which were cited by the appellant. The claim was formally rejected on July 25, 1930 [R. 164] and it was not until November 3, 1930, that the Commissioner ever indicated that in his opinion the claims were barred by the statute of limitations. These facts undeniably show that the claim was reopened by authorization of the Commissioner.

The Trumble Refining Company not being satisfied with the determination made by the Committee on Appeals and Review of only approximately $160,000.00 value for its patent license agreements appealed to the United States Board of Tax Appeals.

On November 19, 1928, the Board of Tax Appeals found that the March 1, 1913 value of the appellee's patent license agreements was $850,000.00 and that it was entitled to an annual deduction from income amounting to $72,511.90 on account of depreciation and exhaustion of the value of said agreements [R. 287]. On April 25, 1929, the appellee filed with the Commissioner its revised claim for refund in the sum of $17,764.08 for taxes plus interest thereon paid for the year 1917 [R. 155]. The amount of that claim was computed in conformity with

the decision of the Board of Tax Appeals. In a letter dated May 22, 1930, the Commissioner notified the appellee that he had allowed an annual deduction in the amount of $72,711.80 for the years 1920, 1922 and 1923, but that since he did not acquiesce in the Board's decision the claims for 1913, 1914, 1915, 1916, 1917 and 1919 would not be allowed In that letter he added that the claims for 1913, 1914, 1915, 1916 and 1919 were barred by the statute of limitations, but nowhere therein did he take the position that the 1917 claim was barred by the statute of limitations [R. 161]. The formal letter rejecting the above claims was dated July 25, 1930 [R. 164]. In a letter dated November 3, 1930, the Commissioner for the first time stated in his negotiations with the appellee that the claim for 1917 taxes was barred by the statute of limitations [R. 314].

Whether there was a reconsideration by the Commissioner is a conclusion to be drawn from the acts of the Commissioner. *Jones v. United States* (Ct. Cl.), 5 Fed. Supp. 146; *J. E. Irvine & Co. v. United States* (Ct. Cl.), 3 Fed. Supp. 334. The issue is one of fact, and because of that this case must necessarily be decided upon its own peculiar facts; however, the facts involved in *American Safety Razor Co. v. United States* (Ct. Cl.), 6 Fed. Supp. 293, are similar enough to the facts of this case that reference thereto is convincing to show that the evidence in this case is legally sufficient to support the District Court's conclusion that the Commissioner did reopen the 1917 case.

The evidence in *American Safety Razor Co. v. United States,* 6 Fed. Supp. 293, relied upon by the lower court, was as follows: There the plaintiff overpaid its taxes for 1923 because it failed to amortize exhaustion of its patents. It filed a timely claim for refund which was rejected by the Commissioner on May 7, 1928, more than two years before the date on which the plaintiff commenced its suit in the Court of Claims. The plaintiff there filed claims for refund of taxes allegedly overpaid for the same reason for the years 1924 to 1926, inclusive. These were likewise rejected. The plaintiff then appealed to the Board of Tax Appeals on deficiencies for the years 1921 and 1922. In a letter dated December 17, 1927, the Commissioner considered all issues raised by the taxpayer including that raised in the 1923 case. The plaintiff then filed claims for 1923 to 1926 on January 12, 1928. All of these claims were similar and each was for depreciation of patents. On December 17, 1927, the Commissioner rejected the claims for 1923 to 1925, inclusive, and on May 26, 1928, he rejected the claim for 1926. The plaintiff then called the Commissioner's attention to a settlement reached by the parties with respect to 1919 taxes concerning the same issue, and requested "that no action be taken on any of the claims until an opportunity for a hearing thereon has been afforded." In reply the Commissioner stated that the case for 1921 and 1922 then pending before the Board would constitute one settlement, and that the other claims would be "made the subject of a separate communication." Pursuant to stipulation the Board ordered the Commissioner to allow the plaintiff a deduc-

tion for amortization of its patents, this was on September 11, 1929. Thereupon adjustment was made for the years 1920 to 1922, inclusive. In a letter dated December 11, 1930, the Commissioner admitted that the plaintiff had overpaid its taxes for the years 1923 to 1926, inclusive, but refused a refund thereof because the plaintiff's application for reopening was not filed within two years of the date when the first claims were rejected. Thereupon the plaintiff brought an action in the Court of Claims for the recovery of said overpayments. The defense was made in that action that the suit was not a timely one and that the Commissioner had never reopened the claims sued upon. The Court held that the evidence showed that the Commissioner had reopened the claims and it gave judgment for the plaintiff.

Another very recent case which supports the lower court's decision in this case is the case of *Borg-Warner v. U. S.,* decided February 7, 1939, and not yet officially reported but found at Par. 5.230, Volume I of the 1939 Prentice-Hall Tax Service. In that case the court decided against the Government and allowed a recovery of admitted overpayments of taxes for the years 1921 and 1922. In that case, as in the case at bar, the issue involved the depreciation of patents and the taxpayer's case before the Board of Tax Appeals involving the years 1920, 1923 and 1924, was decided in its favor in 1931. The taxpayer's original refund claims for 1921 and 1922 were rejected in 1927. In 1929 further claims for those years were filed. The Commissioner wrote the taxpayer in 1932 that they were being considered, but stated in a

letter written in 1934 that the period for bringing suit had expired.

In that case the court reasoned that it was not necessary for the taxpayer to institute an action contesting the Commissioner's rejection of a claim which had for its basis the same issue as that involved in a proceeding before the Board of Tax Appeals concerning another taxable period. The court stated that it did not believe that Congress intended to compel a taxpayer to bring a multiplicity of suits involving the identical question in order to test his tax liability where one suit could decide the fundamental question involved in all the disputes, and that the Commissioner's rejection of the claims before the decision of the Board might well be regarded as premature.

The appellee respectfully submits that the District Court's findings with respect to the claim for 1917 in the amount of $11,870.88 is sustained by the evidence and that the same was not finally rejected by the Commissioner until July 25, 1930. The appellee had every reason to believe that said claim was being considered by the Commissioner until that date. As stated by the court in *McKesson & Robbins v. Edwards* (C. C. A. 2d), 57 Fed. (2d) 147, 149:

> "* * * While all taxpayers are charged with notice of the Commissioner's action (United States v. Michel, 282 U. S. 656, 51 S. Ct. 284, 75 L. ed. 598), they are entitled to look to all he does, else they will be misled and trapped * * *."

In view of the foregoing it is respectfully submitted that the findings of fact made by the court to the effect that the claim for refund was reopened and reconsidered and was not finally rejected until July 25, 1930, are amply supported by the record.

II.

The Claim for Refund Filed by the Appellee on June 17, 1920 Was Legally Sufficient to Warrant the Refund of $7,860.19 Tax Paid by It on May 22, 1923.

The appellee's original claim for refund of 1917 taxes was filed on June 17, 1920 [R. 45]. Reference to that claim shows that it demanded a refund of taxes on the ground that it was rightfully entitled to a deduction (which it had failed to take) for exhaustion of its patent license agreements [R. 15]. At the same time that it filed that claim it filed a claim for abatement for an assessment of a deficiency for the year 1917 in the amount of $6,365.00 and also an amended return [R. 101]. Said deficiency was the result of a computation made by the Commissioner under Section 210 of the Revenue Act of 1917. The appellee's return for that year had been prepared and the computation of tax made under Section 209.

The appellant argues that since the deficiency assessed had not yet been paid at the time that the claim for refund was filed it could not operate as a claim for refund of an amount later paid in satisfaction of the deficiency. In support of that proposition it cites *Riverside Hospital v. Larson* (S. D. Fla.), 384 C. C. H. 9542. That was a hearing on demurrer and the court filed no written opinion in support of its decision. There the Commissioner assessed a deficiency against the plaintiff in the amount of $5300.00 of which $1500.00 had been paid at the time that the plaintiff brought suit. The complaint alleged, and for the purposes of the hearing on demurrer it was admitted, that the total correct tax liability was $1,216.44, so that to the extent of $244.18 the plaintiff had over-

paid its taxes, in spite of the fact that more than $3,000.00 of the deficiency assessed still remained unpaid. The court held that until payment of the entire tax had been made, including the deficiency, no action for the recovery thereof could be maintained. The ground stated for the decision was that there was no authority for allowing a taxpayer to contest an assessment in advance of payment.

Obviously that case is not in point here because in this case the entire tax liability, including the deficiency assessment was paid prior to the time that this action was brought. The reason for denying the plaintiff relief in the Riverside Hospital case was not that the claim had been filed in advance of payment, as the appellant contends, but that a suit was instituted prior to the payment of the tax. Thus, that case does not sustain the appellant's contention.

Aside from the fact that the case cited by the appellant is distinguishable on its facts from the case at bar still the appellee respectfully submits that that decision is clearly wrong. Section 250 (d) (3) of the Revenue Act of 1921 gave this taxpayer the right to contest the assessment of the tax in advance of payment. That section provides that if the Commissioner determines a deficiency of tax under the Revenue Act of 1917 he shall issue a "thirty-day letter" from which the taxpayer may appeal before paying the tax. In addition to that remedy the taxpayer was given another remedy by Section 284 of the Revenue Act of 1926 which provides that where an overpayment of taxes imposed by the 1917 Act is made, the same shall be refunded on the application of the taxpayer. Furthermore, those remedies are not alternatives for the taxpayer may protest the assessment of a deficiency and after paying it may file a claim for refund therefor.

Since the remedies are not alternatives, and since the taxpayer is entitled to pursue both of them, there is no reason for denying him the right to pursue both concurrently unless the denial is expressed in the statute. The appellant argues that it is. Its argument rests upon the decision of the Court of Claims in *Hills v. United States,* 50 Fed. (2d) 302. The appellant says that the foregoing case held that the words "after the payment of such tax" found in Section 3228 of the Revised Statutes mean after the payment of "all" the tax, and that Section 284 (b) (1) (2) means that a claim cannot be filed until payment of all the tax has been made. It is true that in that case the court stated the premise of the appellant's argument but it neither stated nor held that the conclusion drawn by the appellant follows from the premise. The reason that the court gave for saying that "after the payment of such tax" meant after the payment of "all" the tax was that in so doing it thereby fixed a point in time from which an ensuing period could be computed. The holding in that case was only that the statute runs from the date when the last payment of the tax is made, and that the taxpayer is not limited to a recovery of only so much tax as it paid within the four years immediately preceding the date when the claim for refund was filed. Of necessity, the last payment of the tax is made when "all" of the tax is paid. Thus it appears that while the statement made by the court there was proper when read in the light and context of the rest of its opinion yet when it is stated without reference to the facts of that case it is misleading.

Furthermore, Section 3228 of the Revised Statutes does not apply to income and excess profits taxes, *Hills v. United States,* 8 Fed. Supp. 849, 853, and its wording

and construction differ radically from the wording of Section 284 (b) (1) (2) of the Revenue Act of 1926 which is admittedly applicable to the facts of this case. It must be obvious that Section 284 (b) (1) is a statute of limitations intended to set an *outside limit* on the time within which a claim may be filed. As stated by the Supreme Court with reference to this statute in *United States v. Memphis Cotton Oil Company,* 288 U. S. 62, 71, 77 Law Ed. 619, 624, "The function of the statute, like that of limitations generally, is to give protection against stale demands." The reason for enacting a statute of limitations is to encourage promptness in the bringing of actions, *Missouri K. & T. R. Co. v. Harriman Bros.,* 227 U. S. 657, 57 Law Ed. 690. See also *Shipp v. Miller,* 2 Wheat. 316, 4 Law Ed. 248. Such statutes are founded upon the theory that claims which are valid are not allowed to remain unenforced, *Weber v. State Harbor Commissioner,* 18 Wall. 57, 21 Law Ed. 798. In such statutes one does not find limitations on the time before which an action can be brought. The policy which outlaws stale claims does not call for a rule defining premature claims. The plain, obvious and natural meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and careful study of an acute and powerful intellect would discover. *Lynch v. Alworth-Stephens Co.,* 294 Fed. 190, 194. It therefore appears that since the object of the statute was to define stale claims rather than to define premature ones that the appellee's claim was timely and was not premature.

The amount demanded in the claim for refund filed on June 17, 1920 was "$9,749.80 (OR SUCH GREATER AMOUNT AS IS LEGALLY REFUNDABLE)" [Exhibit F, R. 139]. At the time this claim for refund was filed the taxpayer had paid only $11,870.68; at this time the Commissioner had assessed, on a superficial audit, $6,365.00. As a part of the claim for refund the Trumble Refining Company filed an amended income tax return and a claim to abate the additional taxes of $6,365.00. The grounds for the amended return, the claim for refund and the claim in abatement were all the same, namely, the right to take a deduction for the exhaustion of the March 1, 1913 value of the taxpayer's patent license agreements. Inasmuch as the Commissioner reopened and reconsidered the claim for refund and did not file a rejection until July 25, 1930 the appellant's action was a timely one.

In another part of this brief the appellee has shown that final action was not taken on this claim until July 25, 1930. On April 25, 1929, the appellee amended its original claim by increasing the amount of its demand so as to include the $7,860.19 paid in satisfaction of the $6,365.00 deficiency assessed February 21, 1920 [R. 27]. The facts and grounds relied upon in its amended claim were the same as those upon which it had predicated its right to a refund in its original claim. The only difference between the original and the amended claim was that the latter now demanded the return of a greater amount than the original claim. In *Bemis Bros. Bag Company v. The United States,* 289 U. S. 28, 35, 77 L. Ed. 1011, 1015, the Supreme Court held that the taxpayer could amend a

timely claim after the period for filing claims had expired but before final action by the Commissioner where the amended claim differed from the original only in requesting different relief. There the court gave as a reason for holding that the amendment was timely that "In amending the claim by a prayer for alternative relief, a taxpayer is not forcing the inquiry into an unexplored territory, onto strange and foreign paths. He is asking the Commissioner to take action upon discoveries already in the making or perhaps already made."

In *United States v. Andrews,* 302 U. S. 517, 524, 82 L. Ed. 398, 403, the court stated that "an amendment which merely makes more definite the matters already within his (the Commissioner's) knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible." In the case at bar the original claim for refund stated all the facts which would entitle the appellee to a refund of the $7,860.19. If the appellee was entitled to a deduction for exhaustion of the March 1, 1913 value of its patent agreements its taxable net income for the year 1917 would automatically be reduced from $89,469.54 to $16,957.64 and would thus dispense with any question concerning a special assessment. The two questions were relative and dependent. The facts upon which both questions rested were stated in the original claim, and of necessity, the Commissioner had to consider both in order to resolve either one alone. Therefore the appellee respectfully submits that the amendment was permissible within the rule stated in the foregoing cases and that the action brought was timely.

III.

The Tax Liability in Question Is Subject to Review.

A. No Final Determination Was Made That the Appellee's Tax Liability Should Be Computed Under Section 210 of the Revenue Act of 1917.

In *Welch v. Obispo Oil Company,* 301 U. S. 190, 196, 81 L. Ed. 1033, 1036, the Supreme Court considered a special assessment made under Section 328 of the Revenue Act of 1918. There the court stated that "the taxpayer's true net income is an essential factor in the determination of his liability under Sections 327 and 328." In *Heiner v. Diamond Alkali Company,* 288 U. S. 502, 77 L. Ed. 921, principally relied upon by the appellant, the court said that the Commissioner cannot make a final administrative determination under the special assessment provisions until he has determined the net income of the taxpayer. In the case at bar the Commissioner never did finally determine the factor (net income) essential to the determination of the rate of tax applicable under the provisions of Section 210 of the Revenue Act of 1917.

Subsequent events show that the Commissioner never regarded his letter of February 21, 1920 [R. 98] proposing a tax computed under Section 210 as a final determination. The amended income tax return [R. 107], the claim for refund [R. 138], and the claim in abatement [R. 143] were all filed in June of 1920. Each of these instruments protested the Commissioner's disallowance of a deduction for depreciation. Thereafter the Commissioner sent one of his agents to examine the appellee's books for the years 1917 to 1920 inclusive [R. 142], and he later accepted and considered the appellee's brief of February 1, 1922 wherein the demand for a depreciation deduction was repeated [R. 167].

In December of 1922 he agreed that he would hold in abeyance the consideration and final determination of the appellee's tax liability for 1917 until the liability for subsequent years could be reviewed and determined [R. 247]. Pursuant to that understanding and at the Commissioner's request, the appellee filed an unlimited waiver of the statute of limitations for 1917 on February 1, 1923. On February 5, 1923 the Bureau sent its letter disclosing a tax computed under Section 210 based upon a net income of $88,727.83 rather than $89,469.54 upon which the first assessment had been made. At this time he was still considering the issue of depreciation. It is inconceivable that in those four days the Commissioner fully considered the matter anew and made a final determination. Especially is this so in view of the fact that he had assured the appellee that he would further consider the 1917 case together with the other years at a later date. When he requested the waiver for 1917 he still had adequate time (until April 20, 1923) within which he could make an assessment. His request for a waiver and his agreement to consider all the years together certainly negatives the idea that the routine letter of February 5, 1923 was a final determination, furthermore the trial court so held.

When the appellee received the letter of February 5, 1923 it reminded the Commissioner of his agreement of December, 1922 to hold the 1917 case in abeyance [R. 153], and the Commissioner acknowledged by inviting further consideration of the 1917 case [R. 154]. After exhaustive preparation the appellee then filed a brief and protest in which it further argued its right to a deduction for depreciation [R. 167]. Thereafter a conference was held in Washington for the specific purpose of determining the March 1, 1913 value of the appellee's patent license agreements. That was the sole issue in the controversy

for all of those years, and the determination of that issue would fix the appellee's net income which the Supreme Court said was an essential condition precedent to the Commissioner's final determination of a special assessment.

After considering the data presented to him the Commissioner himself determined that the appellee's patent license agreements had a March 1, 1913 value which it was entitled to amortize over the remaining life of the patents [R. 320]. Certainly his action in this regard is inconsistent with the appellant's contention that he intended to make a final determination in his letter of February 5, 1923 or the following letter of February 21, 1923. From the foregoing it is readily apparent that the Commissioner never did make a final determination of the appellee's net income, yet even under the authorities cited by the appellant it must be conceded that a determination thereof is a necessary condition precedent to his final administrative action under Section 210. The appellee never did accept the Commissioner's proposal to make a special assessment, and at no time from June, 1920 until this suit was instituted did the Commissioner indicate that he considered his determination under that section to be final. The technical defense now raised by the appellee appears to have occurred as an afterthought.

The foregoing discussion has assumed that the Commissioner was authorized to make a special assessment. While that may have been true under Section 328 of the Revenue Act of 1918, such was not the case under Section 210 (1) of the Revenue Act of 1917, for in the latter section the statute specifically provided that the application thereof depended upon the inability of the Secretary of the Treasury to determine the taxpayer's

invested capital. It does not appear from the record in this case that the Secretary of the Treasury ever acted in any particular with respect to this case. The appellee never received any notice from him stating that he was unable to determine its invested capital. Neither did the taxpayer receive from him any statement to the effect that the Commissioner of Internal Revenue had been authorized by him to make a special assessment. It therefore appears that the Commissioner not only forced a special assessment upon the appellee without any request made therefor, but that in making the assessment which he did the Commissioner was acting beyond the scope of his authority.

B. Even Assuming That the Commissioner Did Make a Final Determination Under Section 210 of the Revenue Act of 1917 Still the Appellee's Tax Liability for That Year Is Subject to Review Because It Did Not Request a Special Assessment.

The trial court found that the Trumble Refining Company at no time requested or acquiesced in a determination of its excess profits taxes for the year 1917 pursuant to the provisions of Section 210 of the Revenue Act of 1917 and that it at all times protested the determination of its taxes under that section [R. 55]. In *McKeever v. Eaton,* 6 Fed. Supp. 697, the court found that the Commissioner forced a special assessment on the plaintiff for 1918 without its request. The contested issue in that case as in the case at bar was the plaintiff's right to amortization of patent depreciation. There the defendant contended that the tax having been assessed under Sec. 328 of the Revenue Act of 1918 was not reviewable. In that case the court distinguished the cases of

Heiner v. Diamond Alkali Co., 288 U. S. 502, 77 L. ed. 921; *United States v. Henry Prentiss & Co.,* 288 U. S. 73, 77 L. ed. 626; *Williamsport Wire Rope Company v. U. S.,* 277 U. S. 551, 72 L. ed. 985 and *Bemis Bro. Bag Co. v. United States,* 289 U. S. 28, 77 L. ed. 1011. The court in the *McKeever* case, *supra,* stated (702):

> "It thus appears that none of the three cases embody the situation presented in the case at bar. This case is distinguishable from the Diamond Alkali case by the fact that there the taxpayer completely ignores the special assessment, seems never to have in any sense accepted the same, and is not asking this court to apply the rate of tax determined upon by the Commissioner in his special assessment to a base different from that found by him. On the other hand, it is also distinguishable from the Bemis case by the fact that in the Bemis case the special assessment was refused, whereas in the case at bar the special assessment was actually made. However, I find from the entire record the following:
>
> "1. That the Commissioner was adequately apprised, prior to the making of his special assessment, of the various grounds upon which error was claimed in his computation of the tax.
>
> "2. That, while it is true that the prayer for a special assessment was granted and the tax computed accordingly, the taxpayer did not in fact acquiesce in the decision arrived at by the Commissioner, but, on the contrary, consistently kept on claiming errors in the computation of the tax, based upon errors of fact and law.
>
> "3. That the Commissioner never took the position that his special assessment concluded the matter but, on the contrary, kept the case open and kept on re-

examining the situation upon the merits for several years after the special assessment had been made. By the merits in this connection I mean not the merits with relation to special assessment, but the merits of the claims of errors in fact and in law in his computation of the tax.

"Upon this record I therefore reach the conclusion that the making of the special assessment does not constitute a bar to the prosecution of this suit."

In *American Chemical Paint Co. v. McCaughn,* 24 Fed. Supp. 258, the plaintiff brought an action to recover 1919 excess profits taxes. The contested issue in that case was the plaintiff's right to amortize patent depreciation. There as in this case the Commissioner and the plaintiff continued negotiations over a period of years attempting to settle the issue. In the meantime the plaintiff brought an action for the recovery of 1927 income taxes and the court held that it was entitled to an annual depreciation deduction. Thereupon the plaintiff brought suit for its 1919 taxes and on the first hearing the court held for the defendant on the ground that the plaintiff had requested a special assessment under Section 328 of the 1918 Act and that the Commissioner's determination foreclosed judicial review. In support of its decision it cited *Heiner v. Diamond Alkali Company, supra.* On rehearing it vacated its finding that the plaintiff requested a special assessment and thereupon entered judgment for the plaintiff. Thus it appears that in that case the court had before it the very issue involved in this case and after careful consideration of the very distinction for which the appellee contends it concluded that the

decisions which hold that the Commissioner's determination may not be reviewed by a court are not applicable. It should be noted that the Commissioner did not appeal from the judgment in that case. Vol. I, 1938 P-H, Par. 4.17.

The appellant argues that the purpose of Sec. 328 of the Revenue Act of 1918 is the same as that embodied in Sec. 210 of the Revenue Act of 1917. To that extent we agree, namely, that the purpose of the two sections is the same. Congress intended to give the taxpayer a choice of remedies. As stated by the Supreme Court in *Welch v. Obispo Oil Company,* 301 U. S. 190, 191, 81 L. ed. 1033, 1034, the object of enacting the special assessment sections of the Revenue Acts of 1917 and 1918 was to relieve the taxpayer in cases where the profits taxes might prove unduly burdensome. Therefore, it provided that the taxpayer might have either one of two assessments, it could accept the assessment normally made under the statute and if dissatisfied therewith could then appeal for judicial review. On the other hand, if it requested a special assessment under the relief provision it thereby waived its right to a judicial review of the Commissioner's determination. Congress did not intend that the Commissioner should be allowed to force this relief provision upon the taxpayer so that he could thereby impose a greater tax. Where taxpayers have appealed to the Board of Tax Appeals from the Commissioner's determination under the special assessment provisions the Board has consistently held that the Commissioner could

not apply these sections to increase the tax. *Sumpter Valley Railway Company,* 10 B. T. A. 1325, *Frederick A. Tschiffely,* 5 B. T. A. 1242, *Brownsville and Matamaris Bridge Co.,* 1 B. T. A. 320. If Congress did not intend to allow the Commissioner to use these provisions of the Act so that he could increase the taxpayer's liability it certainly did not intend to allow him to foreclose judicial review after having increased the tax by application thereof.

The appellant cites *Con P. Curran Printing Company v. U. S.,* 14 Fed. Supp. 638, a case decided by the Court of Claims wherein that court referred to *McKeever v. Eaton, supra,* and refused to follow its ruling. The appellee respectfully submits that the decision in *McKeever v. Eaton* speaks for itself and furthermore wishes to point out that in *U. S. v. Andrews,* 302 U. S. 517, 527, 82 L. ed. 398, 404, a case appealed from the Court of Claims, the Supreme Court expressly stated that the decision in the *Con P. Curran* case was in conflict with the decisions of the Supreme Court.

The appellant also cites *Welsh v. St. Helen's Petroleum Co.,* 78 F. (2d) 631, for the proposition that this court there rejected the taxpayer's contention that the Commissioner's action in order to be reviewable must be predicated upon a request for a special assessment. However, in that case the taxpayer was a foreign corporation and under Section 327 (b) of the Revenue Act of 1918 it was mandatory that the Commissioner make a special assessment of its taxes. There only one method of assess-

ment was open to the taxpayer which is not the case with respect to a domestic corporation. As stated in *Frederick Warne and Co. v. U. S.*, 62 Ct. Claims, 363, 369, with respect to Section 328 of the Revenue Act of 1918:

> "The statute is in positive terms, and expressly points out its applicability to foreign corporations. Why a discrimination between foreign and domestic corporations was deemed advisable is not for judicial determination. The act used mandatory terms and mentions foreign corporations as not entitled to the exemption provided in section 302."

Whatever the rule may be where the Commissioner's special assessment is the only remedy and is made mandatory by the statute, it is nevertheless clear that where his special assessment is only permissive, and merely constitutes an alternative relief provision for the benefit of the taxpayer, that in such cases he can not arbitrarily impose a special assessment on the taxpayer without the latter's request and thereby precluded a judicial review of his determination.

C. The Special Assessment Proposed by the Commissioner Was Arbitrary.

The trial court found that the Commissioner's action in refusing to allow Trumble Refining Company a deduction of $72,511.90 from its gross income for 1917 in accordance with the decision of the Board of Tax Appeals and in refusing to allow the refund due as a result of such allowance was arbitrary [R. 53-54]. The evidence

adequately supports this finding. The parties stipulated that the appellee's invested capital for 1917 was $67,760.17 as computed under Section 207 of the Revenue Act of 1917 [R. 165]. The appellee's tax liability for 1917 based upon an invested capital of that amount was $3,389.19 [R. 56]; yet the Commissioner acting under a "relief provision" computed the appellee's taxes for that year at $19,730.87.

The taxable net income reported by the appellee was $89,469.54 [R. 43], but the Board of Tax Appeals held that the depreciation deduction to which it was entitled amounted to $72,511.90 [R. 52], so that its correct taxable net income in fact amounted to only $16,957.64. The Board's decision holding that the appellee was entitled to an annual deduction for depreciation was *res adjudicata* and binding upon the Commissioner with respect to all years affected by the decision of that issue, including the year 1917. *Erb et al., Exrs. v. U. S.,* 384 C. C. H. 9589. Yet in spite of that fact it appears that the Commissioner collected $19,730.87—a *tax* actually exceeding the taxpayer's *net taxable income* by $2,773.23. The appellee respectfully submits that better evidence of capricious and arbitrary action could not be imagined. When a tax upon net income exceeds the net income it ceases to be a tax and necessarily amounts to confiscation.

Although the appellee earnestly contends that in granting its prayer for relief the trial court did not review any authorized discretionary act of the Commissioner, yet if this court should be of a contrary opinion then it is

respectfully submitted that the Commissioner's determination is reviewable because it was arbitrary. The rule is well settled that a finding made by an administrative officer within the scope of his authority is not subject to judicial review. On the other hand, where he has acted beyond the scope of his authority, or where his action has been arbitrary, the party aggrieved is entitled to a judicial review of his determination. See *Williamsport Wire Rope Co. v. United States,* 277 U. S. 551, 562, 72 L. ed. 985, 988; *Lucas v. American Code Co.,* 280 U. S. 445, 449, 74 L. ed. 538, 540; *Lucas v. Kansas City Structural Steel Co.,* 281 U. S. 264, 271, 73 L. ed. 848, 852; *Dismuke v. United States,* 297 U. S. 166, 172, 80 L. ed. 561, 566.

Whatever view may be taken of this matter the evidence clearly shows that the action of the Commissioner in making the assessment under Section 210 was arbitrary, erroneous and illegal.

THE STIPULATED INVESTED CAPITAL CLEARLY REFUTES THE STATEMENTS MADE IN THE COMMISSIONER'S LETTERS OF FEBRURY 21, 1920 AND FEBRUARY 5, 1923 TO THE EFFECT THAT THE TAXPAYER'S INVESTED CAPITAL COULD NOT BE DETERMINED. IN ANY EVENT THE STIPULATED INVESTED CAPITAL CONCLUSIVELY DEMONSTRATES THAT THE ILL-CONSIDERED ASSESSMENT UNDER SECTION 210 WAS ARBITRARY AND VOID.

The court found that the correct taxable net income of the taxpayer for the year 1917 was $16,957.64. The tax computed by the Commissioner under the relief provi-

sions amounted to $19,730.87,—$2,773.23 in excess of the net taxable income. The tax which the appellant now tries to hold from the appellee is confiscatory; it is in excess of the net income. Certainly Congress never intended under the relief provisions for the Commissioner to collect and withhold a tax in excess of the net income. The technical and unconscionable defenses now urged against the recovery of the tax shock the sense of justice. Hypercritical and technical defenses should not be sustained. Justice and fair dealing compels a repudiation of such hypertechnical defenses.

After the assessment was made the Commissioner voluntarily determined that the taxpayer was entitled to an annual deduction for the exhaustion of the March 1, 1913 value of its patent license agreements. This determination of itself is sufficient to show that the Commissioner's assessment under Section 210 was without legal or equitable justification.

In view of the foregoing it is respectfully submitted that the decision of the lower court should be sustained.

Respectfully submitted,

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APPENDIX.

ARTICLE 1006: Appeals and hearings. A. R. M. 219. III-4-1331.

RULES OF PROCEDURE BEFORE COMMITTEE ON APPEALS AND REVIEW.

1. The jurisdiction of the Committee on Appeals and Review is limited to cases under section 250(d) of the Revenue Act of 1921 wherein appeals have been perfected pursuant to the procedure specified in article 1006 of Regulations 62, as amended by T. D. 3492 (C. B. II-1, 170), and to such other cases as may specifically be referred to it by the Commissioner of Internal Revenue.

2. When an appeal has been duly perfected and the case forwarded to and received by the Committee, together with a certification by the Income Tax Unit of the issues on appeal, a copy of such certification having previously been mailed to the taxpayer, the taxpayer or his duly authorized representative will be notified of the date and hour set for a hearing of the appeal. A hearing or an opportunity for a hearing before a member is a hearing or an opportunity for a hearing before the Committee.

3. The representative of the taxpayer should be prepared to exhibit at the hearing (1) a copy of his power of attorney, (2) evidence of his enrollment to practice before the Department, and (3) evidence of having filed, as required by departmental regulations, the declaration concerning contingent fees.

4. The statute merely provides that an opportunity for hearing shall be granted. Unless an appearance is made at the time set for hearing, or for adequate cause shown a postponement requested in writing and granted,

the opportunity for hearing will be considered as waived, and the case will thereupon be decided on the record.

5. All evidence submitted by the appellant must be in affidavit form and an outline of the argument showing the authorities relied upon should be in documentary form. If briefs in addition to those filed with the Income Tax Unit are to be submitted to the Committee, they must be filed with the Committee in triplicate at least three days prior to the date set for hearing. Oral evidence may be presented, but such oral evidence can only be confirmatory of the evidence of record. The oral discussion at the hearing will be merely to elucidate the issues or dispose of any misunderstanding with respect to the evidence or argument.

6. The hearing before the Committee can not be made the occasion for the presentation of new evidence. In the event that the hearing develops the desirability of new evidence, it may be admitted or rejected at the discretion of the Committee. If the evidence is admitted, the Committee may in its discretion, resubmit the case to the Income Tax Unit for a further expression of its views upon the issue or issues involved.

7. While only the issues stated in the transmittal letter are before the Committee formally, the Committee is not precluded from calling to the attention of the Unit and of the Commissioner any errors which in its opinion may have been committed by the Unit in adjustments not made the subject of appeal.

8. The hearing or opportunity for hearing before the Committee is the final hearing or opportunity for hearing in the Bureau of Internal Revenue. When a case has been heard or the opportunity for hearing waived and the recommendation of the Committee has been approved by

the Commissioner of Internal Revenue, the decision arrived at and communicated to the taxpayer or his representative is the final decision of the Bureau of Internal Revenue in so far as the issues considered in the recommendation are concerned, and such issues will not again be considered by the Bureau except as provided by T. D. 3492.

9. The procedure herein outlined applies to the Special Committee on Appeals.

Office Decision 709 (C. D. 3, 370) is revoked.

CHARLES D. HAMEL,
Chairman Committee on Appeals and Review.

STATUTES.

SEC. 1113 (a). Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment

of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U. S. C., Title 26, Sec. 1672.)

Revenue Act of 1926.

CREDITS AND REFUNDS.

Sec. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section,—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer;